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NOTES.

BANKRUPTCY—CAN A BANKRUPT'S WIFE TESTIFY AGAINST HER HUSBAND?—STATUTORY CONSTRUCTION—A decision that, if sustained, bids fair to change materially, in those states where a wife cannot testify against her husband, the established rule concerning her competency as a witness in bankruptcy proceedings, was recently handed down by the District Court for the Eastern District of Pennsylvania.[1]

The competency of the wife to be examined in bankruptcy proceedings has been differently treated by the successive Acts of

[1] *In re* Kessler, 225 Fed. 394 (1915).

[2] Act of March 2, 1867, § 26; R. S., § 5088. See *In re* Anderson, 23 Fed. 482 (1885).

Congress. Under the law of 1867,[2] "for good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness." The original provision of the Bankruptcy Act of 1898 relating to the examination of parties, as set forth in Section 21 *a*,[3] reads as follows: "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, *who is a competent witness under the laws of the state in which the proceedings are pending,* to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct or property of a bankrupt whose estate is in process of administration under this act."

Under this provision, the wife of the bankrupt could not testify against her husband if the laws of the state in which the proceedings were pending declared her incompetent.[4] It was soon found that this privilege of immunity from examination facilitated a species of fraud that frequently recurred, by which property was transferred to the wife, or to third persons with the assistance of the wife. In many cases, indeed, the wife was the only witness who could shed light on the whereabouts of secreted assets.

To prevent the bankrupt and his wife from seeking shelter behind the privilege of the marital relation, the amendatory act of 1903[5] altered Section 21 *a* so as to provide: "A court of bankruptcy may . . . require any designated person, including the bankrupt *and his wife,* to appear . . . to be examined concerning the acts, conduct or property of a bankrupt whose estate is in process of administration under this act: *Provided,* that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

Section 21 *a,* in its amended form, was universally considered to have established definitely that the wife of a bankrupt was a compellable witness in all states, provided the examination was limited to "business transactions." Judge McPherson, in *In re Worrell,*[6] said: "The Amendment of 1903 to the Bankruptcy Act enlarges clause *a* of Section 21 so as to make the wife of a bankrupt a competent and compellable witness in any inquiry concerning his acts, conduct and property." The amendatory act has been justly regarded as a step in the right direction, improving, as it has, the administration of the bankruptcy laws to a notable degree. Frequently have elaborate structures of fraud erected by the craft and ingenuity of a rascally bankrupt, been shattered by the testimony of

[2] Act July 1, 1898; Comp. St. 1901, p. 3430.

[4] *In re* Fowler, 93 Fed. 417 (1899); *In re* Jefferson, 96 Fed. 826 (1899); *In re* Cohn, 104 Fed. 328 (1900).

[5] Act Feb. 5, 1903, c. 487, § 7, 32 Stat. 798.

[6] 125 Fed. 159 (1903).

the wife, unable to stand the strain of a rigorous cross-examination, and in this way has the truth been elicited time and again. No question has hitherto been raised as to the power of the court in bankruptcy to give effect to this salutary provision.

But Judge Thompson, in the recent case of *In re Kessler*,[7] flatly lays down the rule that the bankrupt's wife is incompetent as a witness against her husband in the federal courts in Pennsylvania. It is to be regretted that the court did not see fit to justify its stand by full discussion of the objections that naturally present themselves. However, the decision is apparently grounded upon a peculiar construction of an Act of Congress,[8] passed in 1906, which amended Section 858 of the Revised Statutes of the United States[9] to read as follows: "The competency of a witness to testify in any civil action, suit or proceeding in the United States shall be determined by the laws of the state or territory in which the court is held." The court declares the provision of Section 21 *a*, referring to the competency of the wife of the bankrupt, to have been superseded by the Act of 1906, and, by applying the law of the state of Pennsylvania,[10] reaches the conclusion that the bankrupt's wife is incompetent and cannot be permitted to testify against her husband in bankruptcy proceedings in this district.

Is it not absurd to say that Congress actually intended to repeal Section 21 *a* by the Act of 1906? In enacting the latter statute, it was intended to rectify an error in Section 858, so as to exclude evidence concerning transactions with deceased persons in all cases, and not only as against executors, administrators or guardians.[11] There could have been no desire on the part of Congress to annul a provision of the Bankruptcy Act that was most conducive to the promotion of justice and the ascertainment of the truth. At any rate, there was clearly no express repeal of Section 21 *a*, for the Act of 1906 refers in terms only to Section 858 of the Revised Statutes.

[7] *Supra*, note 1.

[8] Act June 29, 1906, 34 Stat. 618.

[9] Section 858, R. S., p. 162, provided: "In the Courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to, or interested in the issue tried, provided that in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court. In all other respects the law of the state in which the Court is held shall be the rules of decision as to competency of witnesses in the Courts of the United States in trials at common law and in equity and admiralty."

[10] Act May 23, 1887, § 5 *c*, P. L. 159, which provides: "Nor shall husband and wife be competent or permitted to testify against each other except. . . ."

[11] 2 House Reports, 59th Congress, 1st Session, No. 2819 (1905-1906). *Supra*, note 9.

The question that is raised is therefore one of statutory construction, or, more particularly, one of statutory repeal by implication. In the first place, the authorities agree that repeals by implication are not favored by the law. Mr. Chief Justice Fuller, in *McChord* v. *Railroad Company*,[12] said, *inter alia*,[13] "Repeals by implication are only allowed to the extent that repugnancy exists, and, in order to give an act not clearly intended as a substitute for an earlier one the effect of repealing it, the implication of the intention to do so must necessarily flow from the language used, bearing in mind the necessity and occasion of the law." It is submitted that if it is possible, by a reasonable interpretation, to read seemingly inconsistent statutes so that they may stand together, the courts should endeavor to do so, and it is further suggested that Section 21 *a* of the Bankruptcy Act and the Act of June 29, 1906, may both be given effect, without resorting to anything but a fair and reasonable construction of the meaning of those statutes.

There is a rule of interpretation as old as the common law itself to the effect that where a subsequent statute is general, and is in affirmative terms, a prior statute, if special, particular, limited, or local in its scope, is to be regarded as an exception to the later general rule.[14] The maxim, *generalia specialibus non derogant*, is uniformly applied.[15] Where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as it comes within its particular provisions.[16] In other words, the special act stands as an exception to the general act. The reason upon which this principle is grounded is thus given by Vice Chancellor Wood in *Fitzgerald* v. *Champneys*:[17] "The legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

By the same token, it should be presumed that when Congress framed the Act of 1906, in general and affirmative terms, it had no

[12] 183 U. S. 483 (1901).

[13] At p. 500. *Accord:* Erie v. Bootz, 72 Pa. 196 (1872); Winslow v. Morton, 118 N. C. 486 (1896); Brown v. County Commissioners, 21 Pa. 37 (1853).

[14] Sutherland: Statutory Construction, ed. 1904, vol. I, pp. 526-538.

[15] Ridgeway v. Gallatin County, 181 Ill. 521 (1899); Moore v. Minneapolis, 43 Minn. 418 (1890); Buffalo Association v. Buffalo, 118 N. Y. 61 (1889).

[16] State v. Egan, 64 Minn. 331 (1896); Kountze v. Omaha, 63 Neb. 52 (1901); People v. Pacific Imp. Co., 130 Cal. 442 (1900).

[17] 30 L. J. Ch. 777 (Eng. 1861), at p. 782.

intention to abrogate the special provision of Section 21 *a*, to the details of which it had previously given its careful attention. It is therefore submitted that, aside from the obviously deplorable consequence of the decision of *In re Kessler*,[18] tending, as it does, to emasculate the Bankruptcy Act to a considerable extent, the opinion of Judge Thompson cannot be sustained when tested by the accepted principles of law applicable to the subject of statutory repeal by implication.[19]

A correct statement of the law as to the competency of witnesses in bankruptcy proceedings, it is submitted, is the following: The competency of persons to testify in bankruptcy is governed by the law of the state wherein the particular proceedings are pending, except that, regardless of state law, the wife of the bankrupt may be examined concerning business transacted by her with or for the bankrupt, or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt.

L. E. L.

CONTRACTS — TERMINATION — WHEN ARE SERVICES "SATISFACTORY"?—Contracts of hiring frequently embrace stipulations to the effect that the employee may be dismissed if his services are not performed in a manner satisfactory to the other party. These so-called "satisfaction contracts" have been fruitful sources of litigation owing to the difficulty of ascertaining what constitutes "satisfaction," which is, in reality, a mental condition. The conclusions reached by the courts are not in harmony.

The first discordant note is struck in determining whether the employer discharging the employee on the ground that his services are not satisfactory must have good reasons for such dissatisfaction. The great weight of authority is that he need not have reasonable grounds therefor.[1] One of the principal reasons for this seems to be that although the employee may have been injudicious or indiscreet in undertaking to work for a compensation

[18] *Supra*, note 1.

[19] The two cases cited by the learned judge in support of his position do not decide that Section 21 *a* has been superseded by the Act of 1906. *In re* Thompson, 197 Fed. 681 (1912), does not consider the question of the wife's competency at all, and applies the Act of 1906 to an entirely different situation. Although *In re* Hoffman, 199 Fed. 448 (1912), does deal with the competency of the wife, it merely decides that the wife is a compellable witness even according to the laws of New Jersey, and that she is *a fortiori* a competent witness in bankruptcy proceedings pending in that state.

[1] Mackenzie v. Minis, 132 Ga. 323 (1909), 23 L. R. A. (N. S.) 1003; Corgan v. Lee Coal Co., 218 Pa. 386 (1907), 11 Am. & Eng. Ann. Cas. 838; Isbell v. Anderson Coal Co., 170 Mich. 304 (1912); Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229 (1907), 12 L. R. A. (N. S.) 403.

which is dependent upon a contingency so doubtful as the satisfaction of the other party, yet, having voluntarily assumed the obligations and the risk of the contract, his legal rights are to be determined solely according to its provisions. The courts will not make a new contract for the parties.[2]

Another reason is that as the word "satisfaction" refers to a mental condition, the parties must have intended, upon entering into the contract, that it was the mental condition of the employer rather than that of a court or jury which was referred to.[3] Moreover, as dissatisfaction is a state of mind it is extremely difficult for the employer to prove the reasons leading to it, and to make him do so would practically annul this clause of the contract, for, without such a clause, he would have the right to dismiss the employee, if he did not properly perform his duties.[4] But there is some authority for the position that the employer upon discharging an employee because his services were not satisfactory as provided in the contract, must have good reasons for his dissatisfaction and particularly if the surrounding circumstances show that such was the intention of the parties, the employer must show that he had a reasonable cause for his dissatisfaction.[5]

The next point in controversy is whether the employer must in good faith be dissatisfied with the services of the employee or whether he has an absolute right to discharge the employee. It would seem that in attempting to prove good faith, from the very nature of the case, the employer would have to show the reason for his dissatisfaction and thus there would be a conflict with the rule, which, as we have seen, provides that he need not have reasonable grounds for his dissatisfaction. But, on the other hand, to allow the employer to discharge the employee on the ground that his services are not satisfactory and not to require that the dissatisfaction be *bona fide,* would practically permit the employer to terminate the contract on any pretext whatever, even in cases where, as a matter of fact, he was not dissatisfied with the services rendered. But this would conflict with the principle that the employer cannot discharge for other causes under the pretext that he is not satisfied.[6] The view generally taken by the courts is that the dissatisfaction of the employer must be real and arrived at in good faith.[7]

[2] Gibson v. Cranage, 39 Mich. 50 (1878); Brown v. Foster, 113 Mass. 139 (1873).

[3] Tyler v. Ames, 6 Lans. 281 (N. Y. 1872).

[4] Allen v. Mutual Compress Co., 101 Ala. 574 (1893).

[5] Bridgeford v. Meagher, 144 Ky. 479 (1911); Beggs v. Fowler, 82 Mo. 599 (1884), where the standard of satisfaction was stated inferentially in the contract.

[6] Alexis Stoneware Mfg. Co. v. Young, 59 Ill. App. 226 (1895); Richardson v. School District No. 10, 38 Vt. 602 (1866).

[7] Parr v. Northern Electrical Mfg. Co., 117 Wis. 278 (1903). See also cases cited in note 1, *supra.*

There is great difficulty, however, in segregating the cases in which the employer's dissatisfaction is merely unreasonable and those in which it is non-existent, especially under those contracts where the employment is of such a nature that it involves the effort to satisfy the personal taste of the employer. No doubt it is this difficulty which has led to the following rule: "If the employment is of the class involving taste, fancy, interest, personal satisfaction or judgment, the question whether the services of the employee are satisfactory is to be determined solely by the employer and not by the court or jury. But where the employment is not of that class, and where the master has the power to discharge the employee if satisfied that he is incompetent, there the good faith is a question of fact which must be submitted to the jury." [8] It is submitted, however, that even in cases involving personal taste, although the employer is to be sole judge of his satisfaction, yet it is proper to require him to exercise good faith, otherwise the clause, "if the services are satisfactory," would be given a meaning foreign to the real intention of the parties. The presence of the element of personal taste or fancy would seem merely to be a circumstance indicative of the employer's intention to be the sole judge of the reasonableness of his satisfaction and should not bear on the question of good faith.

A recent English case is illustrative of the generally accepted doctrine. A contract of employment was entered into containing this provision: "The engagement will be for one year, subject, of course, to your carrying out your duties to the satisfaction of the directors and to economical costs of production." The employee was discharged within the year on the ground that his services were unsatisfactory. In a suit against the employer for wrongful dismissal, the jury found that the defendants were in fact really and genuinely dissatisfied with the plaintiff's discharge of his duties but that they did not have good reasons for such dissatisfaction. Upon these findings, judgment was held to be correctly entered for the defendant employer, it not being necessary under such a contract for the jury to find reasonable cause for the dissatisfaction.[9] But in the course of his opinion Mr. Justice Lawrence said: "The only sense of reasonableness in the matter is this: if it can be said that a reasonable man could not honestly come to the conclusion, then a ground for saying he came to the conclusion dishonestly is made out; but if you admit that a reasonable man could come to the conclusion, the only question is did he in fact, and the decision is for him and not for the jury." This quotation shows, as has been said before, that when it comes to prove good faith, an inquiry must

[8] Saxe v. Shubert Theatrical Co., 57 Misc. 622 (N. Y. 1908). See also Crawford v. Mail & Express Publishing Co., 163 N. Y. 404 (1900), Vann, J., dissenting.

[9] Diggle v. Ogston Motor Co., 112 L. T. 1029 (Eng. 1915).

be made to some extent into the reasonableness of the employer's dissatisfaction.

The problem of the preceding discussion is again involved in the construction of a provision that title shall be "satisfactory" to the vendee in an executory contract for the sale of land. Here, also, the decisions are in conflict. The prevailing view in this class of contracts is ably expressed by Chancellor Kent: "Nor will it do for the defendant (vendee) to say he was not satisfied with his title, without showing some lawful incumbrance or claim existing against it. A simple allegation of dissatisfaction, without some good reason assigned for it might be a mere pretext, and cannot be regarded." [10] This would seem to be the correct view but it is to be noted that it does not correspond to the weight of authority where the construction of the term "satisfaction" arises in a contract of employment.[11] With regard to a contract for the sale of land the courts proceed upon the theory that it must have been the intention of the parties that a valid or marketable title should be satisfactory, although the vendee would have been able to demand a marketable title had there been no mention of a satisfactory title in the agreement. It is suggested that the reason for arriving at this intention of the parties may be found in the fact that the title to land does not involve the personal taste or feeling of the vendee, whereas many contracts of employment do involve such elements.

However, there is considerable authority for the proposition that in an executory contract for the sale of land a provision that the title shall be satisfactory to the vendee, is to be construed to give the vendee an arbitrary right to repudiate the contract on the ground of dissatisfaction with the title, provided only that it be arrived at in good faith.[12] These cases must necessarily proceed on the theory that under the contract the purchaser is the person to be satisfied and to allow a jury to decide would not carry out the contract of the parties.

R. H. W.

LIBEL—IS AN UNSEALED LETTER PUBLICATION?—One of the fundamental elements which must be proved in every action or prosecution for libel or slander is the publication of the defamatory matter. In criminal indictments, it is sufficient to prove the com-

[10] Folliard v. Wallace, 2 Johns, 395 (N. Y. 1807). See also Dillinger v. Ogden, 244 Pa. 21 (1914), 37 Am. & Eng. Ann. Cas. 533; Moot v. Business Men's Ass'n, 157 N. Y. 201 (1898); Giles v. Paxson, 40 Fed. 283 (1889).

[11] For an interesting comparison of a contract to sell land and a contract of employment, see Dillinger v. Ogden, *supra,* note 10, and Corgon v. Geo. F. Lee Coal Co., *supra,* note 1.

[12] Liberman v. Beekwith, 79 Conn. 317 (1906); Hollingworth v. Colthurst, 78 Kans. 455 (1908).

munication of the words complained of to the person defamed;[1] but in civil suits, there must be a communication to a third person.[2]

One who brings a civil action for libel or slander ordinarily must prove that there was in fact a communication to a third person, and that it was due to the fault of the person sued. For instance, if a libellous letter is sent directly to the person libelled, in a sealed envelope, and no third person reads it;[3] or if a third person does read it, but the sender could not anticipate that this would occur, the sender is not liable in a civil suit.[4] On the other hand, if the sender could reasonably have foreseen that a third person would read the letter—as where he knows it is the duty of a clerk to open and examine the recipient's mail—and such third person does actually read it, the sender is subject to suit.[5]

But there are intermediate cases which seeem to have puzzled the courts. For example, a man mails a libellous post-card, and no witness can be produced in court other than the recipient who has read the card. Many courts say that it is fair to presume that some third person has read it, though no proof be offered.[6] In such a case a presumption is raised, on account of the difficulty of actual demonstration. Again, a man sends to the person libelled a defamatory letter in an envelope the flap of which is not fastened. Should this be considered in the same category as the post card, or should it be treated as a sealed letter?

This problem arose in a recent English case[7] under the following circumstances: A husband mailed to his wife a libel upon her, contained in an unsealed and ungummed envelope, bearing a halfpenny stamp, and addressed to the wife in her maiden name. The Post Office authorities had the right to examine the contents of envelopes bearing halfpenny stamps, but no evidence was offered that they had done so in this instance. It was proved, however, that the wife's butler, his curiosity excited by the mode of address, had opened the envelope and read the libel, though this was admittedly a breach of his duty. Two points were made, *inter alia,* against the husband: that there was a presumption of publication to the postal

[1] State v. Avery, 7 Conn. 266 (1828). This is on the ground that the libel tends to produce a breach of the peace. Rex v. Wegener, 2 Stark. 245 (Eng. 1817).

[2] Roberts v. English Mfg. Co., 155 Ala. 414 (1908); Yousling v. Dare, 122 Ia. 539 (1904). In Scotland, however, no publication to a third person is necessary to found a civil action, as the Scotch law considers the injury to the feelings of the person defamed a sufficient basis for damages. Mackay v. M'Cankie, 10 Session Cases, 4th series, 537 (Scotland 1883).

[3] Spaits v. Poundstone, 87 Ind. 522 (1882).

[4] Sylvis v. Miller, 96 Tenn. 94 (1896).

[5] Rumney v. Worthley, 186 Mass. 144 (1904).

[6] Logan v. Hodges, 146 N. C. 38 (1907); Spence v. Burt, 18 Lanc. L. R. 251 (Pa. 1901).

[7] Huth v. Huth, 113 L. T. 145 (Eng. 1915).

officials, and that there was a publication to the butler. The court negatived both propositions.

The two questions raised in this case are separate, and depend upon different considerations. The postal authorities have a right to examine mail matter of a certain class, and no doubt exercise that right in a certain proportion of cases. Shall the law presume that they have done so in a particular instance? In the question of publication to the butler, however, there is an actual perusal by an outside person, but should the sender of the letter be held responsible for that perusal?

The general rule is that publication must be affirmatively established, in order to create liability for defamation.[8] But often it is practically impossible to prove actual publication, that is, in the sense of finding a witness to swear that he heard or read the defamation and comprehended it. This is true notably in the case of post cards and telegrams. Should the law aid the plaintiff in such cases by presuming publication, though no such witness can actually be produced? A telegram is necessarily transmitted by a clerk who reads it, though this may be done mechanically and without attention on his part to the real sense of the message. Yet it has been held that a communication by telegraph is a publication to the telegraph company, though no clerk be found who remembers reading the particular message.[9]

The telegram, however, presents a stronger case for the plaintiff than the post card. No one has the duty of reading post cards, except the actual parties thereto; and as a matter of fact, it is unlikely that a busy postal clerk will have time to read cards passing through his hands. Country postmasters, however, are in fiction at least supposed to constitute an exception to this rule. Again, however, there is a difficulty of legal proof, so certain courts have relieved the plaintiff of this necessity by raising a presumption that there was a publication. But it should be remembered that it is much more difficult for the defendant to prove that no third person read the post card than it is for the plaintiff to prove that some third person did read it; and in addition it must be remembered that according to the general rule the burden of proving publication is on the plaintiff.[10] The propriety of making the presumption, therefore, is not universally conceded.[11]

An unsealed letter bearing a halfpenny stamp is somewhat different from a post card. On the one hand, it is not so open to the eye, and therefore not so likely to be read casually; but on the other hand, there is an actual duty on the part of the postal authorities to

[8] McGeever v. Kennedy, 19 Ky. L. Rep. 845 (1897); Odgers: Libel & Slander 152 (4th ed., 1905).

[9] Monson v. Lathrop, 96 Wis. 386 (1897).

[10] *Supra,* note 8.

[11] See Steele v. Edwards, 15 Ohio C. C. 52 (1897).

examine a certain number of such letters. It would seem that courts which favor the plaintiff sufficiently to presume publication of a post card, where there is no duty of examination by third persons, should follow this reasoning consistently in the case of an unsealed letter, where there is such a duty as to that class of mail, though not necessarily as to the particular letter. But on principle it might be argued that the plaintiff should be required strictly to sustain his usual burden of affirmative proof. The English court, in the case under discussion, draws a distinction between the post card and the unsealed letter, and refuses to apply the doctrine of presumptive publication to the latter.

Where it is proved that a third person has read a libel, but under circumstances which render his act a breach of duty, a different problem is presented. Again a comparison may be made between a post card and an unsealed letter. It is really a breach of moral duty at least to read post cards addressed to another, though there may be times when one's eye happens to fall upon a writing without volition. But the courts have not considered that point in those decisions which hold one responsible for publication by post card. They say simply that one should anticipate that post cards will probably be read by outside parties, whether in breach of duty or not. Where the defendant knows that it is the duty of a clerk or other third person to read mail passing through his hands, it is established that there is a publication;[12] and these courts extend the doctrine to the situation where it is to be foreseen that someone other than the addressee will read the libel, though there is no duty so to do. It is conceivable that one may libel another and yet not be morally blameworthy, as where one believes the truth of the libel and feels it one's duty to communicate it to the person defamed; yet in such cases it has been declared that the defamer should use every reasonable precaution to prevent the libel from becoming public, and should not let a slightly higher postage prevent him from using a sealed letter.[13]

Why should not one who sends a libel in an unclosed envelope take the risk of its being read by a curious butler? The argument in reply is that a servant will seldom go to the extent of opening an envelope, even though it be unsealed, to gratify his curiosity. Whether this is so or not is a question which can hardly be answered by convincing demonstration. The decision necessarily must be influenced largely by the general inclination of the judicial body which hands it down, unless the principle be adopted that a defamer is not responsible for a communication to a third person due to a breach of duty on the part of the latter, whether such breach could have been foreseen or not.

E. E.

[12] Delacroix v. Thevenot, 2 Stark 63 (Eng. 1817); Seip v. Deshler, 170 Pa. 334 (1895).

[13] Robinson v. Jones, 4 L. R. Ir. 391, 396 (Ireland 1879).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—OPERATION AND EFFECT—EXCLUSIVENESS OF REMEDY PROVIDED—A recent case in New York presents, for the first time in that state, if not in the entire country, a judicial decision upon the liability of an employer to his employee for an injury arising out of and in the course of his employment, for which no compensation is provided in the act. The plaintiff, a driver in the employ of the defendant, was bitten by a horse in the ear and as a result, amputation of part of the ear was necessary. It was alleged that the horse was, to the knowledge of the defendant, vicious and accustomed to bite mankind. It was held that since the injury was not included in the schedules of the act, the right to recover for it remained as before the passage of the act.[1]

This decision, it is submitted, is undoubtedly contrary to the purposes of the act and prejudicial to its proper administration. The purpose of the various Workmen's Compensation Acts in the several states is to provide a just, reasonable and speedy compensation to the employee for all injuries which he has sustained as a result of his employment and which have a tendency to impair, either temporarily or permanently, his earning power. The acts are intended, on the one hand, to protect the employee from a prolonged and dilatory legal contest when the claim is well founded, and on the other hand, to protect the employer from the expense and annoyance of suits where there is no legal right of recovery. Not only has the employer been deprived of the defences of contributory negligence, voluntary assumption of risk and the negligence of a fellow servant, but his liability has been extended to all injuries resulting from the employment which reduce the earning power of the employee, regardless of the fault of either party. In return it is intended that he shall be relieved from liability for injuries which do not reduce the workman's earning power, as pain, suffering, disfigurement, *etc.*, even though incidental to the employment.

It is the last consideration which the Appellate Division of the New York Supreme Court has either failed to recognize or been unable to apply. Under the construction which it has put upon the New York Act, the workman gains a new right of immense value and gives up no part of his existing right, while the employer is subjected to a new and heavy burden without the slightest diminution of the old. The decision is likewise not in accord with the general canons of statutory construction as applied by the majority of the courts. The rule is well stated in two Wisconsin cases:[2] "The common rule as to construing legislation in derogation of the common law strictly against a purpose to change it has little or no

[1] Shinnick v. Clover Farms Co., 154 N. Y. Supp. 423 (N. Y. Sup. Ct., App. Div., 1st Dept., 1915).

[2] Milwaukee v. Miller, 144 N. W. 188 (Wis. 1913); Sadowski v. Thomas Furnace Co., 146 N. W. 770 (Wis. 1914).

application to the efforts to create a new system for dealing with personal injuries to employees." . . . "The conditions giving rise to a law, the faults to be remedied, the aspirations evidently intended to be efficiently embodied in the enactment, and the effects and consequences as regards responding to the prevailing conceptions of the necessities of public welfare, play an important part in shaping the proper administration of the legislation." [3] Michigan is the one state that has construed the act strictly as being in derogation of the common law.[4]

The principal case is an instance of the application of bad principles of law to a statute poorly drawn and unfortunately worded. Although even a liberal construction of the wording of the act might lead to the same conclusion, the decision cannot be supported upon the reasoning of the opinion. It seems best first to examine the case and its decision. Section 10 of the New York Act [5] provides: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause of such injury." Section 11 provides: "The liability prescribed by the last preceding section shall be exclusive." The court, in its opinion, said: "If the schedules do not cover the injury suffered by an employee, he does not fall within the purview of the act and cannot claim compensation under it. As to such an injury, therefore, the right to recover remains as it was before the act was passed."

The words "for which compensation is provided in the schedules of this article" have in effect been read into Section 10 of the Act so that now it virtually reads: "Every employer shall pay compensation according to the schedules for the disability or death of his employee *for which compensation is provided in the schedules of this article.* . . ." Section 11 provides that the liability prescribed in Section 10 shall be exclusive, but exclusive of what? By the reasoning of the court, it is exclusive "in all cases provided for by the schedules" and not "in all cases of injuries arising out of and in the course of the employment," as the purposes of the act demand that it should be construed. The schedules are for the purpose of determining the amount of compensation, not for the pur-

[3] See also Young v. Duncan, 106 N. E. 1 (Mass. 1914); Appeal of Hotel Bond Co., 93 Atl. 245 (Conn. 1915), "The statute is remedial in character, and its provisions are to be broadly construed in order to effectuate its purpose."

[4] Andrejwski v. Wolverine Coal Co., 148 N. W. 684 (Mich. 1914), "This statute being in derogation of the common law should be strictly construed, and that fundamental principle must be applied, although it is remedial and provides a remedy against a person who otherwise would not be liable."

[5] Laws of 1914, c. 41 (N. Y.).

pose of limiting the purview of the act to injuries for which compensation is provided therein. The result of the failure to appreciate this fact is that the employee is held to be within the act and subject to it only when he has received an injury for which he can be compensated under the act, and if no compensation is provided, his right to sue remains unchanged by the act.

Under similar reasoning and principles of construction, Section 12 of the Act which provides that "no compensation shall be allowed for the first fourteen days of disability" would be read to mean "no compensation *under the act.*" The workman is then enabled to sue in the courts for damages for injuries resulting in disability for less than a fortnight. This illustrates more clearly than the principal case that the reasoning therein is destructive of the very purposes of the act.

On the other hand, a proper reading of the statute renders it extremely difficult to avoid a similar result. The act provides that the employer shall pay compensation "for the *disability* or death of an employee" resulting from an injury arising out of and in the course of the employment. The New York Act is the only one of those examined which uses the phrase "*disability* or death." All the other acts read "for the *injury* or death." "Disability" means "loss of earning power" and is much narrower than the word "injury." There are many injuries sustained in the course of the employment as disfigurement, suffering, *etc.*, for which rights of action existed before the passage of the act, which are included in the word "injury," but not in the word "disability," which extends only to such injuries as reduce the workman's earning power. It immediately becomes clear that the act does not make any provision whatsoever for injuries arising out of the employment which do not result in a loss of earning power, but rather excludes them entirely from its operation. It is doubtful whether even a liberal application of the liberal canons of construction applied in the other states could remedy the defect.

In view of the preceding considerations, the provision in Section 11 that the liability in Section 10 shall be exclusive, can only be held to mean that the liability which is to be exclusive is the liability for disability or death and that it is exclusive of any other remedy for that disability or death. It is inconceivable, in view of the general scope of this class of legislation, that the legislature would have passed the act, had they known its true meaning. Such a construction of the act is to be regretted as it is evidently contrary to the intent of the legislature, but it is superior to that of the New York Supreme Court in that it prevents a misconstruction of Section 12, the section which provides for no compensation during the first two weeks of disability.

Curiously enough, the one other state which applies the strict rule of construction to this act, is also burdened with a statute which makes possible and in fact may compel a decision identical with

that of the New York court. The Michigan statute provides: "Any employer who has to pay compensation as hereinafter provided shall not be subject to any other liability whatsoever, save as herein provided, for the death of, or personal injury to, any employee, for which death or injury compensation is recoverable under the act." [6]

This question can never arise in the great majority of states, due to the express provision in the acts that the compensation provided for shall be the exclusive remedy for all injuries arising out of and in the course of the employment. The Pennsylvania Act provides: "Such agreement [to accept the provisions of the act] shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment or to any method of determination thereof, other than as provided in . . . this act." [7] The Connecticut Act provides: "The acceptance of this act by employers and employees shall be understood to include the mutual renunciation and waiver of all rights and claims arising out of injuries sustained in the course of the employment as aforesaid, other than rights and claims given by . . . this act." [8] The Minnesota Act is also a good example of the "exclusive remedy" clause as it should be drawn. [9]

P. C. W.

SURETYSHIP—WILL ADVANCE PAYMENTS DISCHARGE A SURETY?—A problem interesting theoretically, and practically of much importance, recently came before the highest court of Maine. While the facts of the case are by no means novel, being typical of several cases which have arisen under building contracts, in view of the somewhat confused state of the law on the subject, considerable importance attaches to the decision. The defendant had become surety on a bond given by a contractor to secure the performance of two construction contracts. By the terms of the contracts the contractor was to be paid on the fifteenth day of each month for the estimated value of the work done during the preceding month, less fifteen per cent of the amount, which was to be retained by the owners until the completion of the undertaking. Without the surety's consent a payment of five thousand dollars was made by the owner to the contractor twenty-one days in advance of the time when, under the contract, it became due. On the date when the payment was made, however, work exceeding in value the amount advanced, had been performed by the contractor since the last regular payment. It was

[6] Public Acts of Michigan, Extra Session of 1912, No. 10, part 1, § 4.

[7] Act of June 2, 1915, Laws of 1915, p. 736 (Pa.).

[8] Conn. Laws of 1913, c. 138, part B, § 1.

[9] Minn. Laws of 1913, c. 467, part 1, §§ 9 & 10. See also 102 Ohio Laws, p. 528 (1911); Wis. Stat. of 1911, c. 110 a, § 2394-4.

held that the alteration of the contract was not material, and that the surety was not thereby discharged.[1]

A difficulty in the decision of this class of cases frequently arises from the fact that in many cases equities apparently equal arise simultaneously in favor of the owner and of the surety. An advance payment by the owner to the contractor, by itself, undeniably removes one of the incentives which the contractor has to pursue his contract to completion, and thereby prejudices the rights of the surety. On the other hand, an advance payment may enable a contractor, especially if he be hard pressed financially, to complete or continue a contract which he must otherwise abandon, and thereby enure to the benefit of the surety. Such a situation came before the court in *Calvert* v. *London Dock Company*,[2] the leading authority upon the rights of sureties in building contracts. It was there urged that the advances made it possible for the contractor, who was handicapped by lack of funds, to complete a greater portion of the work than he could otherwise have done. The court held that the fact that the advances were calculated to benefit the sureties was immaterial, and the surety was discharged.[3]

It is interesting to examine the only authority to which the court in the case under discussion refers as directly sustaining its decision. In that case[4] one thousand dollars had been paid to the contractor before such payment was due, but at a time when work to the value of three thousand dollars had been performed by the contractor since the last payment. A week later the contract was abandoned. Mr. Justice Chase said that while the payment was without reference to the contract and there was therefore no alteration of the contract itself, a mere advance payment might be an act so antagonistic to the interests of the surety as to relieve him from further obligation on his contract. He then continued: "It was not made simply as a loan for the benefit of the owner and the defendant in case of a failure on the part of the contractors to complete their work. . . . The payments made cannot, under any view that can be taken of them, be said to remove in any degree the incentive that the contractors had prior thereto for completing the contract."

That the owner in such a case should be permitted to lend money to the contractor in an entirely independent transaction, unconnected with the construction contract, without discharging the surety is conceded, and it is so held.[5] But when the owner, as in this

[1] Maine Cent. R. R. Co. v. National Security Co., 94 Atl. 929 (Me. 1915).

[2] 2 Keen 638 (Eng. 1858).

[3] Since this case the broad general rule is laid down by text writers that advance payments to the contractor in a building contract discharge the surety. Brandt: Suretyship and Guaranty, 3rd ed., vol. I, § 439; Childs: Suretyship and Guaranty, p. 166.

[4] St. John's College v. Aetna Indemnity Co., 201 N. Y. 335 (1911).

[5] Meyer v. Bichow, 133 La. 975 (1913).

case, advances money which is to be used in the furtherance of the contract by the contractor and intends to charge the amount against the contractor in his next payment, it is submitted that the line between such a loan and an advance is rather finely drawn. It is true that by the application of the amount to the purposes of the contract, the surety is relieved *pro tanto,* and thereby benefited, but it is, nevertheless, an advance, and the subterfuge in calling it a loan, should not prevent the rule from applying.[6]

The reason advanced in such cases for not discharging the surety is that as the work performed exceeds in value the amount advanced, the inducement to the contractor to complete the work remains. But this does not necessarily follow. If one conceives a case where the contractor is finding his contract unprofitable, he might well be tempted to discontinue by an advance payment of an installment not yet due. The mere fact, therefore, that the owner, even after the advance is made, remains debtor to the contractor, as he did both in the New York case and the one under discussion, is not conclusive that the inducement of the contractor to complete his contract was not impaired or diminished by such payment. Furthermore, if an advance under such circumstances does not constitute a material alteration of the contract, if it is used in the furtherance of the work and is therefore beneficial to the surety, it would seem that logically the surety should be liable for the amount advanced, inasmuch as it is not in such case tantamount to the surrender of a security. But both the case under discussion and the New York case [7] held that the surety in any event was relieved *pro tanto* to the extent of the unauthorized advance.[8]

The test as to what constitutes a "material variance" under such a contract has been held to be whether it substantially increased the chances of the loss incurred against. "It is not a question whether the variance actually caused the breach of the bond; but whether it was such a variance as a reasonably careful and prudent person undertaking the risk would have regarded as substantially in-

[6] In Wells v. National Surety Co., 222 Fed. 8 (1913), the court sought out the real nature of such a contract. There a contractor to aid a bonded sub-contractor executed his accommodation note to the sub-contractor, it being understood that the contractor should "protect himself" out of the proceeds which should become payable to the sub-contractor under the contract. The court said that the effect of the note transaction was to anticipate payments as completely as though the owner had advanced money, with the understanding that it was to be so repaid. "This deprived the surety of the protection and the incentive of restricted payments, and was just as prejudicial as if the advance were less disguised."

[7] *Supra,* note 4.

[8] But in Fitger Brewing Co. v. American Bonding Co. of Baltimore, 149 N. W. 539 (Minn. 1914) it was intimated that the surety would be relieved only to the extent that it was damaged by the excess payment. If the excess was employed in the furtherance of the contract, this damage would obviously be *nil.*

creasing the chances of loss." [9] This rule of foresight seems to have been lost sight of in some of the decisions.[10]

In ordinary cases of suretyship the early rule of *strictissimi juris,* according to the great weight of authority, still prevails.[11] A number of modern decisions, inconsistent with this rule, are based upon an entirely different principle, which has been stated thus: "The doctrine that a surety is a favorite of the law, and that a claim against him is *strictissimi juris* does not apply where the bond or undertaking is executed upon a consideration by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves 'surety companies' their business is in all essential particulars that of insurance." [12] That one of the reasons, at least, for giving a gratuitous surety the benefit of the rule of *strictissimi juris* is absent in the case of sureties for consideration, is undisputable. Such a surety is no longer one who "assumes the burdens of the contract without sharing its benefits" and possibly may not come within the principle that "an innocent surety is always a favorite subject of legal protection," but whether he ought to be permitted, notwithstanding the fact that he receives consideration, "to prescribe the exact terms upon which he will enter into an obligation, and to insist upon his discharge if those terms are not observed" may be another question.[13] It is in this branch of the law that, owing to a failure to distinguish sharply between the situation of surety companies which become surety for profit and individuals who occasionally lend their credit gratuitously, there is much uncertainty and confusion. For example, while both in the case under discussion and the New York case [14] the defendants were companies engaged in becoming surety for profit, in neither of

[9] Stewart, J., in Young v. American Bonding Company of Baltimore, 228 Pa. 373 (1910).

[10] In Loughney v. Huntsman Construction Co., 63 Pitts. 171 (Pa. 1913), a recent lower court decision in Pennsylvania, where notes were given in advance, the court held that the surety was not discharged because the owner withheld twenty per cent. of the amount payable which he was not required to do under the contract, and because "the latest of the notes in question was paid a long time before the default, it does not appear how there could be any material injury, or any injury whatever to the defendant by reason of the payment." *Non constat,* however, that *at the time the advance was made,* the risk was not increased thereby.

[11] Board of Commissioners of Morgan County v. Branham, 57 Fed. 179 (1893). In Blackburn v. Morel, 79 S. E. 492 (Ga. 1913), Russel, J., said: "The liability of a surety is *stricti juris,* and cannot be extended; and a surety is relieved by any act which tends to increase his risk; and whether in fact there is an increase of his risk or not, there is a breach of the contract."

[12] Young v. American Bonding Co., *supra,* note 9. See also Brandt: Suretyship, 3rd ed., vol. 1, § 15; Pingrey: Suretyship, 2nd ed., § 442.

[13] Quotations are from opinion of Baker, J., in Board of Commissioners v. Branham, *supra,* note 11.

[14] *Supra,* note 4.

the opinions is this given as the reason for the decision, nor is the fact that the defendants are such companies especially emphasized. If based upon this rather widely acknowledged exception in the case of such companies, the decisions are entirely proper as the alterations in both cases might possibly be construed as immaterial. But if, as the language of the decisions would indicate, they attempt to lay down a broad rule applicable to sureties generally, it is suggested that they represent a departure from the rule of *strictissimi juris* which is not sanctioned by the weight of authority.[15]

Whether or not the exception depriving the surety for hire of some of the defenses of the gratuitous surety is justified on principle, the rule laid down by the Pennsylvania court at least possesses the merit of definiteness. That court has said: "The trend of all our modern decisions, federal and state, is to distinguish between individual and corporate suretyship where the latter is an undertaking for money consideration by a company chartered for the conduct of such business. In the one case the rule of *strictissimi juris* prevails as it always has; with respect to the other, because it is essentially an insurance against risk, underwritten for a money consideration by a corporation adopting such business for its own profit, the courts generally hold that such a company can be relieved from its obligation for suretyship only where a departure from the contract is shown to be a material variance." [16]

The rule in the federal courts is less certain. In *Supreme Council* v. *Fidelity and Casualty Company of N. Y.*[17] the court apparently adopted the exception in the case of sureties for hire. But in a recent case[18] the court said: "The advancements are so large and substantial that it may be accepted as self evident that the alteration by the plaintiff proved prejudicial to the surety, *if such showing should be deemed important.*" [19] This would appear to cast some doubt upon the present attitude of the federal courts.

It is submitted that the existing confusion in the law on this subject is due either to a failure to distinguish sharply the exception in the case of a paid surety or to a reluctance to admit that such a

[15] *Supra,* note 11. In Fitger Brewing Co. v. American Bonding Co., *supra,* note 8, the surety was held discharged under similar circumstances, it not being stated that the decision was based upon the receipt of compensation by the surety. In the New York case, *supra,* note 4, the court said: "The rule . . . ought not to be extended beyond the reason for the rule, particularly when the surety is engaged in the business of becoming surety for pay and presumably for profit." Thus here no clear conception is apparently made in the case of sureties for hire. In the case under discussion no reference to the receipt of compensation by the surety was made.

[16] Stewart, J., at p. 380, in Young v. American Bonding Co., *supra,* note 9. See also Fels & Co. v. Mass. Bonding & Insurance Co., 48 Pa. Super. Ct. 27 (1911).

[17] 63 Fed. 48 (1894).

[18] Justice v. Empire State Surety Co., 218 Fed. 802 (1914).

surety and a gratuitous surety stand on substantially different grounds. There is much to be said in favor of the certainty of the Pennsylvania rule in this regard. Whether logically there is any reason for the exception is another matter. It seems only just that, where a surety company inserts in its contract an elaborate list of questions, which the obligee is to answer, and the answers to which become warranties by the terms of the contract, thereby forming what is to all practical purposes an insurance policy, the privileges incident to a contract of suretyship should not attach.[20] But where the surety merely receives a compensation for his risk, and his contract is not essentially different from that of a gratuitous surety, it is suggested that the same rule ought to be applied to both. It is true that in the former situation his identity as an innocent bystander with no opportunity for profit and a liability to suffer loss disappears.

There are some who would assail the rule of *strictissimi juris* itself as a principle wholly without justification in modern law. However that may be, it is submitted that while such a rule exists in favor of technical sureties who act gratuitously, a true surety, even if acting for compensation, should be able to contract with reference to it;[21] and that an exception predicated solely upon the receipt of compensation and not upon any inherent difference in the contract entered upon, is without justification.

B. M. K.

[19] Italics not found in the original.

[20] Brandt: Suretyship and Guaranty, 3rd ed. vol. 1, § 15.

[21] See Guaranty Co. v. Pressed Brick Co., 191 U. S. 416 (1903).